

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
)	
DESIGN DEVELOPMENT LLC)	
)	
)	
)	
RESPONDENT)	CASE NO. WPC07-0216

DIRECTOR’S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, Director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed Director of the Tennessee Division of Water Pollution Control (hereinafter the “director” and the “division” respectively) by the Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the “commissioner” and the “department” respectively).

II.

Design Development LLC, (hereinafter the “Respondent”) is the owner of a residential development located on Shag Rag road in Putnam County, Tennessee (hereinafter the “site”). Service of process may be made on the Respondent through

James F. McKinnie, Registered Agent, at 5712 Boatman Lane, Cookeville, Tennessee, 38506.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the “Rule”). Pursuant to T.C.A. §69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a “person” as defined at T.C.A. §69-3-103(20) and, as hereinafter stated, the Respondent has violated the Act.

V.

Bear Creek and its unnamed tributaries and unnamed wetlands are referred to herein, as “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. In accordance with Department Rule 1200-4-4, “Use Classifications for Surface Waters,” Bear Creek and its unnamed tributaries and unnamed wetlands have been classified for the following uses: Fish and Aquatic Life, Recreation, Irrigation, and Livestock Watering and Wildlife.

VI.

Tennessee Code Annotated §69-3-108 requires a person to obtain coverage under a permit prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substances will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the “TNCGP”) may be obtained by submittal of a Notice of Intent (NOI), site-specific Storm Water Pollution Prevention Plan (SWPPP), and appropriate fee.

Pursuant to T.C.A. §69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a §401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

FACTS

VII.

On March 2, 2007, the Respondent submitted a NOI, SWPPP, and application fee to the Cookeville Environmental Field office (CK-EFO), requesting coverage under the TNCGP for construction activities at the site. The division issued coverage on April 10, 2007.

VIII.

On May 21, 2007, division personnel from the CK-EFO conducted a complaint investigation at the site and observed that Erosion Prevention and Sediment Control (EPSC) measures were inadequate, not in accordance with the SWPPP, and that equipment had been operating in the unnamed tributary of Bear Creek. In addition, division personnel observed unauthorized alterations to a wetlands area that the SWPPP specified would be left intact, and that sediment had migrated into the unnamed tributary of Bear Creek.

IX.

On May 25, 2007, the division issued a Notice of Violation (NOV) for the violations observed during the May 21, 2007, site visit.

X.

On June 5, 2007, Division personnel conducted an on site Compliance Review Meeting (CRM) with the Respondent. During this meeting the need for stabilization of an

unauthorized road crossing and debris removal to restore a potential wetland were discussed.

XI.

On June 8, 2007, the respondent submitted an ARAP application to the CK-EFO requesting written authorization under the General Permit for Construction and Removal of Minor Road Crossings (GP-MR). The division issued written authorization for this activity on June 12, 2007.

XII.

On August 1, 2007, the division issued correspondence confirming the findings of a wetland delineation report conducted at the site by Mr. Ken Morgan. Construction activity had previously occurred in one of the wetland areas identified in the report. This correspondence also instructed the Respondent to install EPSC measures to protect the identified wetlands and to obtain an ARAP prior to wetland alterations.

XIII.

On August 27 and August 28, 2007, division personnel conducted a complaint investigation at the site. Division personnel noted that an unauthorized stream alteration had occurred, and that EPSC measures at the road crossing covered by ARAP #NR0707.107 were inadequate and in need of maintenance. At the north side of the site personnel observed sediment loss off site at Candyland Drive.

XIV.

On September 4, 2007, the division issued a NOV for violations cited during the August 27-28, 2007, site visit.

VIOLATIONS

XV.

By physically altering waters of the state without authorization under an ARAP, failing to comply with the terms of an ARAP and by failing to comply with terms and conditions of the TNCGP as described herein, the Respondent has violated T.C.A. §§69-3-108(a) and (b) and 69-3-114(b), which state:

T.C.A. §69-3-108:

- (a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.
- (b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:
 - (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
 - (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological,

biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;

- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

T.C.A. § 69-3-114 (b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

ORDER AND ASSESSMENT

XVI.

WHEREFORE, pursuant to the authority vested by T.C.A. §§69-3-107, 69-3-109, 69-3-115, and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER and ASSESSMENT to the Respondent:

1. The Respondent shall implement appropriate EPSC measures to ensure that no eroded material leaves the site and enters waters of the state. Documentation that EPSC measures have been implemented is to be sent within FIFTEEN (15) DAYS of receipt of this Order and Assessment to the manager of the Division of Water Pollution Control located at the CK-EFO at 1221 South Willow Avenue, Cookeville, Tennessee, 38506.
2. The Respondent shall maintain EPSC measures until final site stabilization.

3. The Respondent shall, within THIRTY (30) DAYS of receipt of this Order and Assessment, submit to the division an ARAP application for wetlands alterations at the site. The submittal shall be sent to the Water Pollution Control Natural Resources Section (NRS) manager at, 7th Floor, L&C Annex, 401 Church Street, Nashville, Tennessee, 37243.
4. The Respondent is hereby assessed a CIVIL PENALTY in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000.00).
 - a. The Respondent shall pay FOUR THOUSAND DOLLARS (\$4,000.00) to the division within THIRTY (30) DAYS of receipt of this Order.
 - b. The Respondent shall pay FOUR THOUSAND DOLLARS (\$4,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 1 above in a timely manner.
 - c. The Respondent shall pay THREE THOUSAND DOLLARS (\$3,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 2 above in a timely manner.
 - d. The Respondent shall pay FOUR THOUSAND DOLLARS (\$4,000.00) to the division within THIRTY (30) DAYS of default, if, and only if, the Respondent fails to comply with Item 3 above in a timely manner.
5. The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

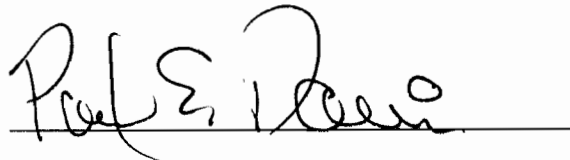
The director may, for good cause shown, extend the compliance dates contained within this Order and Assessment. In order to be eligible for this time extension, the

Respondent shall submit a written request to be received a minimum of THIRY (30) DAYS in advance of the compliance date. The request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension will be in writing.

Further, the Respondent is advised that the foregoing Order is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondent in the future. The director may, for good cause shown by the Respondent, extend for a fixed time period, the compliance dates contained within this Order.

The director will reply to the Respondent's request in writing. Should the Respondent fail to meet the requirement by the extended date, any associated CIVIL PENALTY shall become due THIRTY (30) DAYS thereafter.

Issued by the Director of the Division of Water Pollution Control on behalf of the Commissioner of the Tennessee Department of Environment and Conservation on this 22nd day of October, 2007.

A handwritten signature in black ink, appearing to read "Paul E. Davis", is written over a horizontal line.

Paul E. Davis, P.E.
Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§69-3-109, 115, allow any Respondent named herein to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the Department's Office of General Counsel (OGC) a written petition setting forth each of the Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within THIRTY (30) DAYS of receiving this Order and Assessment. The petition should be sent to: "Appeal of Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548".

If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. §4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible

for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payments of the civil penalty shall be made payable to the "Treasurer, State of Tennessee," and sent to the Division of Fiscal Services-Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L&C Tower, 401 Church Street, Nashville, Tennessee 37243. All other correspondence regarding this matter should be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, at 6th Floor L & C Annex, 401 Church Street, Nashville, Tennessee 37243-1534. Please write your case number on all payments and all correspondence concerning this matter.